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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of ROSE and
FRIEDRICH KABBE.

B165947

(Los Angeles County
Super. Ct. No. D014001)

ROSE KABBE,

Appellant,

v.

FRIEDRICH KABBE,

Respondent.

APPEAL from an order of the Superior Court of Los Angeles County. Richard A. Curtis, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Rose Kabbe, in pro. per., for Appellant.

No appearance for Respondent.

In an attempt to collect over \$8,000 in spousal support arrearages, Rose Kabbe (Wife) caused to be filed an order to show cause (OSC) and affidavit for contempt against her former husband Friedrich Kabbe (Husband) and caused subpoenas to be served on the Social Security Administration and the Franchise Tax Board seeking documents pertaining to wages and benefits received by Husband, as well as his current address. On January 15, 2003, the court took the matter off calendar, the minute order stating that Wife's motions were denied without prejudice and that the court found the "issues are better served in Federal courts." Wife appealed from the January 15, 2003 order. We affirm the order because Wife fails to establish any prejudicial error.

FACTUAL AND PROCEDURAL BACKGROUND

Husband and Wife were married in 1967 and obtained a final judgment of dissolution of marriage in 1985. The 1984 interlocutory judgment required Husband to pay spousal support of \$300, increased to \$450 per month after the sale of the family residence, and "until further order of court, [Wife's] remarriage, [Wife's] death, or [Husband's] death, whichever event first occurs." The interlocutory judgment also contained a provision by which the court retained jurisdiction to carry out the provisions of the interlocutory judgment.

In February 1997, Husband filed an OSC for modification, seeking to terminate spousal support, but the record does not indicate any ruling on this OSC. Yet an April 5, 1999 minute order on Wife's OSC for modification provided that spousal support was reinstated, with Husband ordered to pay Wife \$230 per month. At the time of the April 5, 1999 order, Husband was represented by counsel, who appeared for Husband at the April 5 hearing.

In December 1999, Husband's attorney withdrew as his attorney, with the notice of withdrawal listing Husband's last known address in West Hills, California. In December 1999, Husband obtained a Texas driver's license.

Upon Wife's motion, the court made an order on September 20, 2001, directing that Husband pay spousal support arrearages of \$5,669 to the court trustee in a lump sum. Husband was not present in court on September 19, 2001. In November 2002, Wife

caused to be filed an OSC and affidavit for contempt, citing Husband for failing to pay \$8,659 in spousal support, which included the lump sum payment of \$5,669, and ordering him to appear in court on January 13, 2003. In her affidavit, Wife stated that Husband's whereabouts at that time were unknown, but he apparently had moved to Texas in 1999. Wife attempted to locate Husband by contacting Husband's past employer, the post office, the county recorder's office and the Los Angeles County child support agency. By certified mail, Wife mailed Husband a copy of the OSC and affidavit for contempt at the West Hills, California, address, with the proof of service indicating that an individual other than Husband signed the receipt for the documents.

In December 2002 and January 2003, Wife served subpoenas on the Social Security Administration (SSA) and the Franchise Tax Board, seeking financial records pertaining to Husband, and his address. SSA responded to Wife in a letter, explaining that the records she sought were protected by federal privacy laws and could not be disclosed without Husband's written consent, or unless an exception applied to the prohibition against unconsented disclosure. Wife sought to cite SSA with an OSC and affidavit for contempt, but her proposed OSC was not signed by any judicial officer. In her affidavit, Wife argued that the information she was seeking from SSA pertaining to Husband's financial status was not privileged, that the information was necessary for due process in the contempt proceeding, and that social security disability and retirement benefits were subject to assignment or garnishment to enforce support obligations.

In a letter to Wife, SSA requested that she withdraw her OSC, asserting that state courts did not have jurisdiction to issue subpoenas to federal employees for testimony arising out of their official duties and that any state court order purporting to compel compliance with such invalid subpoena would be unenforceable.

In a responsive declaration to the arguments of SSA, Wife argued that Husband had advised SSA to withhold information from her with the intent to conceal himself and to avoid his court-ordered support obligation.

At a January 15, 2003 hearing attended by Wife but not by Husband, the court stated, "The motion is denied without prejudice. . . . [T]he federal courts have said that

with the Privacy Act [5 U.S.C. § 552a] . . . it's not good enough just for a clerk issued subpoena to be issued to a federal agency that has privacy records[,] . . . it requires a judge to be engaged in the weighing process to determine what can be subpoenaed and what can't be. [¶] . . . [¶] And you can either bring the motion again or perhaps the easiest and simplest thing would be to bring an application for a court issued subpoena as opposed to a clerk issued subpoena supported by your statement as to the necessity of having the particular information . . . disclosed in the subpoenaed documents.” The minute order stated that the OSC was taken off calendar and that “[t]he court finds issues are better served in Federal courts.”

Wife appealed from the January 15, 2003 order. She contends that the court abused its discretion in improperly balancing her need for discovery of Husband's address and financial assets against his privacy interests, that he may not refuse to produce copies of his income tax returns to the court, and that the superior court, and not the federal court, has subject matter jurisdiction in this postjudgment enforcement proceeding to collect spousal support.

DISCUSSION

Wife requests that we reverse the order with respect to Husband as well as the Franchise Tax Board and SSA. To the extent that the trial court denied Wife any relief on the ground that it lacked subject matter jurisdiction and that the matters were better addressed in federal court, we conclude that the court erred. The trial court had continuing, exclusive jurisdiction to enforce its spousal support order. (See Fam. Code, § 4914.)¹ But any error by the trial court in this regard would not be prejudicial if Wife

¹ Family Code section 4914 provides in pertinent part: “(a) A tribunal of this state issuing a spousal support order consistent with the law of this state has continuing, exclusive jurisdiction to modify the spousal support order throughout the existence of the support obligation. [¶] . . . [¶] (c) A tribunal of this state that has continuing, exclusive jurisdiction over a spousal support order may serve as either of the following: [¶] (1) An initiating tribunal to request a tribunal of another state to enforce the spousal support

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was otherwise not entitled to prevail on her OSC on the merits. We thus proceed to address the merits of the other issues raised by Wife on appeal.

As to Husband, Wife fails to establish that the denial of relief constituted prejudicial error because there is no indication that Husband was personally served with the OSC and affidavit for contempt, and the trial court was not asked to make any findings that would validate the method of service used by Wife — service by certified mail at Husband’s last known address.

In a contempt proceeding, “[t]he order to show cause acts as a summons to appear in court on a certain day and, as its name suggests, to show cause why a certain thing should not be done. [Citation.] Unless the citee has concealed himself from the court, he must be personally served with the affidavit and the order to show cause; *otherwise, the court lacks jurisdiction to proceed.* ([Code Civ. Proc.], § 1015 [in civil actions in which a party is represented by an attorney, ‘the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt’]; see also [Code Civ. Proc.], § 1016; *Arthur v. Superior Court* [(1965) 62 Cal.2d 404,] 408)” (*Cedars-Sinai Imaging Medical Group v. Superior Court* (2000) 83 Cal.App.4th 1281, 1286–1287.)

The rule requiring personal service on the citee “is not based on a statutory requirement of personal service of the affidavit, however, for no statute specifically regulates its service. Rather, it is a judicially created rule, believed necessary because the order to show cause is an original pleading in a quasi-criminal action. Courts have, therefore, fashioned certain exceptions to that rule without having to confront the problem of legislative regulation of the field.” (*In re Abrams* (1980) 108 Cal.App.3d 685, 691.) “Some cases have permitted a substituted service of the order to show cause

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order issued in this state. [¶] (2) A responding tribunal to enforce or modify its own spousal support order.”

on the person's attorney, for example, in these circumstances: The alleged contemner was once subject to the court's personal jurisdiction, generally as a party litigant. The court order allegedly disobeyed was made when the court still had personal jurisdiction over the party. The party was present in court, either actually or constructively through his attorney, when the order issued. The party later violated the order, but could not be personally served with the affidavit charging contempt. Under such circumstances, substituted service has been authorized as an exercise of the court's continuing jurisdiction to enforce its valid orders. In these cases, the original order which the contemner disobeyed . . . was invariably communicated to the contemner during an ongoing lawsuit. The alleged contemner, therefore, unquestionably knew of his obligation. [Citations.] Most of these cases involved post-dissolution proceedings, and attempted enforcement of support or custody orders. The cases dealt with the conceptual difficulty of the enforcement procedure being a new, independent action, i.e., a contempt proceeding, either by finding no absolute statutory prohibition against a substituted service of a contempt charge [citations], or by articulating the maxim a party cannot defeat the jurisdiction of the court to punish for contempt by concealing himself to avoid service [citations], or by articulating the continuing jurisdiction concept already alluded to which justifies service on, for example, the party's attorney because the enforcement is still part of a continuing case during which notices and papers were validly served on the attorney [citation]." (*Id.* at pp. 691–692.)

The court in *In re Abrams* also noted that in the cases involving post-dissolution proceedings, the substituted service was approved ahead of time by the court, and the citee thus had notice that a court had examined the facts of his evasion or concealment and found that the circumstances justified substituted service. (*In re Abrams, supra*, 108 Cal.App.3d at p. 692.)

In *Albrecht v. Superior Court* (1982) 132 Cal.App.3d 612, the Court of Appeal issued a writ of mandate to the superior court, directing it to enter an order quashing an OSC for contempt in a post-dissolution proceeding involving child custody because the OSC was served on the wife's attorney but not on the wife. The court held that the

husband's declaration alleging only that the wife was concealing herself and may have left the state did not provide a sufficient basis for service on the wife's attorney and compliance with the requirement for personal service on the wife would be excused only when the husband had taken steps reasonably calculated to apprise the wife of the OSC. (*Id.* at p. 619.) "Real party [(the husband)] should attempt to ascertain [the wife's] whereabouts by contacting friends and relatives and past employers, or by utilizing such means as the Department of Motor Vehicles and parent locator services. [Citation.] Real party may attempt service at [the wife's] last known address, or service by publication in a newspaper upon a proper showing. (See e.g., Code Civ. Proc., § 415.50.) If real party's attempts to serve and notify [the wife] prove fruitless, real party should prepare an affidavit or declaration stating with some specificity attempts made and their results. This will provide the trial court with an adequate basis to determine the propriety of allowing substituted service on [the wife's] counsel as an act of its continuing jurisdiction. . . . If the court finds sufficient basis, it may then issue a new order to show cause and direct service on counsel. Thus, real party is not without a remedy." (*Albrecht v. Superior Court, supra*, 132 Cal.App.3d at p. 620.)

In this case, Wife made attempts to locate Husband and served him at his last known address by certified mail. Whether the circumstances were sufficient to meet due process requirements, and whether Wife is entitled to an order permitting her to serve the OSC on Husband by substituted service or by publication, are issues the trial court was not asked to address. Wife thus fails to establish that the ruling constituted error as to her claims against Husband.

As to the Franchise Tax Board, Wife asks that we reverse the trial court's order with directions to compel the Franchise Tax Board to produce Husband's financial records and income tax returns *to the court* under Family Code section 3552.² But Wife

² Family Code section 3552 provides: "(a) In a proceeding involving child, family, or spousal support, no party to the proceeding may refuse to submit copies of the
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fails to establish that Family Code section 3552 applies to the Franchise Tax Board and she cites no other authority to support her arguments as to the Franchise Tax Board. We also take note of Revenue and Taxation Code section 19542, which provides in pertinent part that “it is a misdemeanor for the Franchise Tax Board or any member thereof, or . . . other officer or employee of the state . . . , who in the course of his or her employment or duty has or had access to returns, reports, or documents required to be filed under this part, to disclose or make known in any manner information as to the amount of income or any particulars . . . set forth or disclosed therein.” Wife thus fails to show that she was entitled to prevail on her claims against the Franchise Tax Board.

With respect to SSA, it refused to produce the documents subpoenaed by Wife on a number of grounds, including the assertion of the privacy rights of Husband. Wife fails to provide any pertinent authority to establish that her state court subpoena for SSA documents pertaining to Husband’s benefits was valid and enforceable. Accordingly, Wife fails to show any reversible error with respect to SSA.

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party’s state and federal income tax returns to the court, whether individual or joint. [¶] (b) The tax returns may be examined by the other party and are discoverable by the other party. A party also may be examined by the other party as to the contents of a tax return submitted pursuant to this section. [¶] (c) If the court finds that it is relevant to the case to retain the tax return, the tax return shall be sealed and maintained as a confidential record of the court. If the court finds that the tax return is not relevant to disposition of the case, all copies of the tax return shall be returned to the party who submitted it.”

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

ORTEGA, J.